A

ANANDA DHARMALINGAM

v.

CHANTELLA HONEYBEE SARGON

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
HASHIM YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NOS: W-02-1260-04, W-02-728-05,
C W-02-898-05 & W-02-899-05]
27 DECEMBER 2006

FAMILY LAW: *Children - Custody - Variation of custody order - Whether wife entitled to custody and control of children - Mental state of*
D *wife - Estoppel - Children's wishes - Material changes in circumstances - Question of access*

These were four related appeals arising from the suit for the custody of the two children of the marriage involving the petitioner
E husband ('husband') and the respondent wife ('wife'). In Appeal No. W-02-1260-04 ('Appeal No. 1'), the wife appealed against the decision of the High Court dated 9 November 2004 refusing to grant an order of interim maintenance of the two children against the husband. In Appeal No. W-02-728-05 ('Appeal No.
F 2'), the husband appealed against the High Court's decision dated 13 June 2005 varying the custody order dated 14 October 2003 and giving custody of the two children to the wife. In Appeal No. W-02-898-05 ('Appeal No. 3'), the husband appealed against the High Court's decision dated 9 August 2005 dismissing the
G application by the husband under s. 100 of the Law Reform (Marriage and Divorce) Act 1976 ('Act') to submit the two children for an expert examination and evaluation by a child psychiatrist. In Appeal No. W-02-899-05 ('Appeal No. 4'), the wife appealed against the decision of the High Court dated 5 July
H 2005 allowing the application of the husband for an order of stay of execution of the custody order dated 13 June 2005.

The husband had filed a petition for judicial separation and, by way of *ex parte* summons in chambers, applied for the custody of the two children of the marriage. The High Court granted custody
I and control of the two children to the husband together with an injunction restraining the wife from taking the children out of the

husband's custody and control. The wife was allowed access to the children, and on 15 April 2003, she held the two children during the period of access given to her and had, ever since, denied the husband from meeting the children. On 14 October 2003, after a full trial, the High Court again granted custody and control of the two children to the husband. The wife filed an application to vary this order, whereby she applied for custody of the two children and that she be allowed to bring the children to stay with her in Australia. On 13 June 2005, the High Court ordered that custody of the two children be given to the wife and that no access be given to the husband until a child psychiatrist had certified that the children were ready and prepared to meet the husband. There were two current reports on the wife by Professor Hussain Habil of Universiti Malaya Specialist Centre ('Professor Hussain') and Professor T. Maniam of Hospital UKM ('Professor Maniam') unequivocally stating that the wife did not suffer from depression or any mental illness and was a fit mother. These findings were confirmed by Dr. Chin Cheuk Ngen ('Dr. Chin'), whose first report in October 2000 stating that the wife was diagnosed as suffering from major depression had formed the basis of the High Court decision granting custody of the children to the husband.

Held (dismissing Appeal No. 2 and Appeal No. 3, and affirming High Court's judge's orders dated 13 June 2005; with regard to Appeal No. 1, case to be remitted back to High Court for a full hearing of all issues on claims of maintenance; Appeal No. 4 rendered academic and thereby struck out)

Per Zulkefli Makinudin JCA:

(1) The High Court's decision of 14 October 2003 was inexplicable because the learned judge in that instance had preferred the outdated reports of Dr. Chin, whose last consultation was in August 2000, and not the then current reports of the two eminent psychiatry professors, Professor Hussain and Professor Maniam, given just before they gave evidence in court, which was in January 2003. And this was so despite the fact that the same learned judge had recorded in her notes of evidence that the relevant state was the wife's current state, and that Dr. Chin himself had said the best persons to comment on the wife's state of mind were her current doctors, Professor Hussain and Professor Maniam. (para 8)

(2) The ground of estoppel, which was raised by the husband against the wife challenging or contradicting the order of 14 October 2003 on the basis that the High Court then had accepted Dr. Chin's diagnosis as the most accurate and reliable, did not apply to children's cases, especially in this case when there was a variation order reverting custody back to the wife on grounds that there had been material changes in the circumstances since August 2000. It must also be noted that the law presumed that the younger child, who was under seven years of age, should be under the custody care and control of his mother and the elder boy, who refused to be separated from the younger brother, should also be given to the mother. (para 12)

(3) As regards the other grounds of appeal by the husband, it was noted that he wanted this court to revert back to the findings of the High Court in the original custody order dated 14 October 2003 *ie*, the acceptance of Dr. Chin's diagnosis that the wife was suffering from major depression and that Professor T. Maniam's reports prepared in October 2000 were flawed and unacceptable. For the purpose of the present appeal, these were irrelevant since the appeal now was in respect of the variation order dated 13 June 2005 where there were material changes in circumstances. The wife's present healthy state was confirmed by her current doctors. The husband's ground that Professor T. Maniam's report in November 2004 was a continuation of his earlier reports was totally unjustified. Both the professors' reports prepared for the variation application were made after five years' observation of the wife, and they had both given the wife a clean bill of health. This was corroborated by Dr. Chin's latest report filed herein as ordered by the Court of Appeal on 9 May 2006. (para 13)

(3a) There had been material changes in the circumstances as evidenced by the reports of both professors in November 2004. The learned High Court judge, in granting the variation order, had taken full cognizance of the said reports and the wishes of the children, who had shown increasing maturity. The court has a duty under the Child Act 2001 to protect children who are obviously emotionally or physically injured. Both the children had shown signs of emotional injury as could be seen from the reports of one Dr. Nor Hamidah, a child psychiatrist. (paras 13 & 14)

(4) The husband should accept the situation that had come about for whatever reasons, the reality being that the two children could not be compelled to see their father under the present circumstances. The ongoing fight over the custody and access of the two children between the husband and the wife was a futile exercise that should stop. In this case, the learned judge was perfectly right when he directed that no access to the two children be given to the husband until a child psychiatrist had certified that they were ready and prepared to meet the husband. It was certainly not the intention of the learned judge to have the husband as the father of the two children 'debarred' from access in the sense that he was unsuitable. The situation was that access simply could not be made to work at the present time until the two children recovered from the trauma of the past events that they had gone through. (para 20)

Bahasa Malaysia *translation of headnotes*

Ini adalah empat rayuan yang berkaitan antara satu sama lain, yang berbangkit dari guaman untuk hak jagaan dua orang kanak-kanak dari perkahwinan antara suami pempetisyen ('suami') dan isteri responden ('isteri'). Dalam rayuan No. W-02-1260-04 ('Rayuan No. 1'), isteri merayu terhadap keputusan Mahkamah Tinggi bertarikh 9 November 2004 atas keengganan mahkamah tersebut membuat perintah nafkah interim kedua-dua kanak-kanak terhadap suami. Dalam rayuan No. W-02-728-05 ('Rayuan No. 2'), suami merayu terhadap keputusan Mahkamah Tinggi bertarikh 13 Jun 2005 yang mengubah perintah jagaan bertarikh 14 Oktober 2003 dengan memberi jagaan kepada isteri. Dalam rayuan No. W-02-898-05 ('Rayuan No. 3'), suami merayu terhadap keputusan Mahkamah Tinggi bertarikh 9 Ogos 2005 yang menolak permohonan suami di bawah s. 100 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') supaya kedua kanak-kanak dibawa kepada pakar sakit jiwa kanak-kanak untuk pemeriksaan dan penilaian. Dalam rayuan No. W-02-899-05 ('Rayuan No. 4'), isteri merayu terhadap keputusan Mahkamah Tinggi bertarikh 5 Julai 2005 yang membenarkan permohonan suami untuk perintah penangguhan pelaksanaan perintah jagaan bertarikh 13 Jun 2005.

Suami telah memfail petisyen untuk pemisahan kehakiman dan, melalui saman dalam kamar *ex parte*, memohon untuk jagaan kedua kanak-kanak dari perkahwinannya. Mahkamah Tinggi membenar hak

jagaan dan kawalan kepada suami bersekali dengan injunksi menghalang isteri dari mengambil kanak-kanak dari jagaan dan kawalan suami. Isteri diberi hak melawat, dan pada 15 April 2003, dalam satu tempoh lawatan, isteri terus mengambil kanak-kanak dan melarang suami dari menemui mereka. Pada 14 Oktober 2003, selepas satu pendengaran penuh, Mahkamah Tinggi sekali lagi memberikan hak jagaan dan kawalan kedua kanak-kanak kepada suami. Isteri memfail permohonan untuk mengubah perintah ini, di mana beliau memohon untuk mendapatkan jagaan kedua kanak-kanak dan kebenaran untuk membawa kanak-kanak tinggal bersamanya di Australia. Pada 13 Jun 2005, Mahkamah Tinggi memerintahkan bahawa jagaan kedua kanak-kanak harus diberikan kepada isteri, dan tiada akses harus diberi kepada suami sehinggalah pakar sakit jiwa kanak-kanak mengesahkan bahawa kanak-kanak sanggup dan bersedia untuk menemui suami. Terdapat dua laporan semasa ke atas isteri oleh Profesor Hussain Habil dari Pusat Pakar Universiti Malaya ('Profesor Hussain') dan Profesor T. Maniam dari Hospital UKM ('Profesor Maniam') yang dengan tegas menyatakan bahawa isteri tidak mengalami sakit jiwa atau kemurungan dan bahawa beliau adalah seorang ibu yang berkeupayaan. Dapatan-dapatan ini disahkan oleh Dr. Chin Cheuk Ngen ('Dr. Chin'), iaitu orang yang membuat laporan pertama pada Oktober 2000 menyatakan bahawa isteri telah didiagnosis sebagai mengidap penyakit kemurungan yang teruk, laporan mana menjadi asas kepada perintah Mahkamah Tinggi memberikan jagaan kanak-kanak kepada suami.

Diputuskan (menolak Rayuan No. 2 dan Rayuan No. 3, dan mengesahkan perintah hakim Mahkamah Tinggi bertarikh 13 Jun 2005; berhubung Rayuan 1, kes diremit ke Mahkamah Tinggi untuk perbicaraan penuh atas semua isu berkaitan nafkah; Rayuan No. 4 menjadi akademik dan dibatalkan)
Oleh Zulkefli Makinudin HMR:

(1) Keputusan Mahkamah Tinggi pada 14 Oktober 2003 tidak boleh dihuraikan oleh kerana yang arif hakim telah memilih laporan Dr. Chin yang sudah lapuk, di mana konsultasi terakhirnya adalah pada Ogos 2000, dan tidak memilih laporan-laporan terkini oleh dua orang profesor sakit jiwa yang ternama, Profesor Hussain dan Profesor Maniam, yang dibuat sejurus sebelum mereka memberi keterangan di mahkamah, iaitu pada Januari 2003. Pilihan sedemikian dibuat

walaupun yang arif hakim yang sama sebelum itu telah merekodkan dalam nota keterangannya bahawa keadaan yang relevan adalah keadaan semasa isteri, dan bahawa Dr. Chin sendiri telah berkata bahawa orang yang terbaik yang boleh memberi komen tentang halkeadaan fikiran isteri adalah doktor-doktor peribadi si isteri, iaitu Profesor Hussain dan Profesor Maniam.

(2) Alasan estopel, yang dibangkit oleh suami terhadap isteri, yang mencabar atau menyangkal perintah 14 Oktober 2003 atas alasan bahawa Mahkamah Tinggi waktu itu telah menerimapakai diagnosis Dr. Chin sebagai yang paling betul dan berasas, tidak terpakai kepada kes kanak-kanak, terutama kepada kes di sini di mana terdapat perintah variasi memberi jagaan balik kepada isteri atas alasan wujud perubahan-perubahan material sejak Ogos 2000. Harus juga diingat bahawa undang-undang menganggap kanak-kanak yang lebih muda, yang berumur di bawah tujuh tahun, harus berada di bawah jagaan dan kawalan ibunya dan yang lebih tua, yang enggan dipisahkan dari ibunya, harus juga diberikan kepada ibunya.

(3) Berhubung alasan-alasan rayuan lain yang dikemukakan suami, dapat dilihat bahawa beliau mengkehendaki supaya mahkamah kembali kepada dapatan asal Mahkamah Tinggi memberi perintah jagaan pada 14 Oktober 2003, iaitu dapatan yang menerima diagnosis Dr. Chin bahawa isteri mengalami masaalah kemurungan teruk dan bahawa laporan Profesor T. Maniam yang disediakan pada Oktober 2000 adalah cacat dan tak boleh diterima. Bagi maksud rayuan semasa, ini adalah tidak relevan kerana rayuan ini adalah berkaitan perintah variasi bertarikh 13 Jun 2005 di mana terdapat perubahan material pada halkeadaan. Keadaan kesihatan isteri yang baik masa kini telah disahkan oleh doktor-doktor semasanya. Alasan suami bahawa laporan Profesor T. Maniam pada November 2004 adalah sambungan kepada laporan-laporan awalnya tidak berjustifikasi. Laporan kedua-dua profesor yang disediakan bagi permohonan variasi dibuat setelah memerhati isteri selama lima tahun, dan mereka mengesahkan bahawa keadaan kesihatan isteri adalah baik. Ini disokong oleh laporan terakhir Dr. Chin yang difailkan di sini seperti yang diperintahkan oleh Mahkamah Rayuan pada 9 Mei 2006.

(3a) Terdapat perubahan material pada halkeadaan seperti yang terbukti dari laporan kedua-dua profesor pada November 2004. Yang arif hakim Mahkamah Tinggi, dalam membenarkan perintah variasi, telah memberi perhatian teliti kepada laporan serta hasrat kanak-kanak, yang semakin dewasa. Mahkamah mempunyai tanggungjawab di bawah Akta Kanak-Kanak 2001 untuk melindungi kanak-kanak yang mengalami kecederaan fizikal mahupun yang terganggu emosinya. Kedua kanak-kanak menunjukkan tanda-tanda gangguan emosi seperti yang dilihat dari laporan oleh Dr. Nor Hamidah, seorang pakar sakit jiwa kanak-kanak.

(4) Suami harus menerima keadaan yang berbangkit dengan seadanya, iaitu realiti bahawa kedua kanak-kanak tidak boleh dipaksa untuk menemui bapa mereka dalam keadaan yang wujud sekarang. Pertikaian yang berlarutan di antara suami dan isteri mengenai jagaan dan akses kepada kedua kanak-kanak adalah sesuatu yang sia-sia dan harus diberhentikan. Dalam kes ini, yang arif hakim betul bilamana memerintahkan bahawa tiada akses diberi kepada suami untuk menemui kedua kanak-kanak sehinggalah pakar sakit jiwa kanak-kanak mengesahkan bahawa mereka sanggup dan bersedia untuk menemui suami. Bukanlah menjadi tujuan yang arif hakim untuk 'melarang' suami sebagai bapa kepada kanak-kanak dari mendapat akses kepada kanak-kanak dalam ertikata bahawa beliau tidak sesuai untuk mendapat akses. Kedudukannya adalah, akses tidak dapat diberikan buat masa ini sehinggalah kedua kanak-kanak pulih dari trauma yang mereka alami dari peristiwa-peristiwa lalu.

Case(s) referred to:

Churchard v. Churchard [1984] FLR 635 ***(refd)***

Re B (Children Act Proceedings) (Issue Estoppel) [1997] 1 FLR 285 ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 17(1)(a), (b), (g), (h), 88(2)(b), 96, 100

For the petitioner husband - Foo Yet Ngo (Faridah Abdullah with her); M/s YN Foo & Partners

For the respondent wife - Chew Swee Yoke (Walter Pereira with her); M/s Kamarudin & Partners

[Appeal from High Court, Kuala Lumpur; vide Judicial Separation Petition No: S8-33-837-2000]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] There are four related appeal cases; Nos. W-02-1260-04, W-02-728-05, W-02-898-05 and W-02-899-05 fixed for hearing before us arising from the suit for the custody of the two children of the marriage involving the petitioner husband and the respondent wife. In Appeal Case No. W-02-1260-04 ("Appeal No. 1") the respondent wife is appealing against the decision of the High Court dated 9 November 2004 in refusing to grant an order of interim maintenance of the two children against the petitioner husband. In Appeal Case No. W-02-728-05 ("Appeal No. 2") the petitioner husband is appealing against the decision of the High Court dated 13 June 2005 in varying the custody order dated 14 October 2003 and giving custody of the two children to the respondent wife. In Appeal Case No. W-02-898-05 ("Appeal No. 3") the petitioner husband is appealing against the decision of the High Court dated 9 August 2005 in dismissing the application by the petitioner husband under s. 100 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act") to submit the two children for an expert examination and evaluation by a child psychiatrist. In Appeal Case No. W-02-899-05 ("Appeal No. 4") the respondent wife is appealing against the decision of the High Court dated 5 July 2005 in allowing the application of the petitioner husband for an order of stay of execution of the custody order dated 13 June 2005.

Facts Of The Case

[2] The relevant background facts of the case and the chronology of events involving the petitioner husband and the respondent wife are as follows:

(1) The petitioner husband and the respondent wife were married on 18 July 1991 in Melbourne, Australia and subsequently registered the marriage in Petaling Jaya, Selangor, Malaysia. On 10 August 2000 the petitioner husband filed a petition for judicial separation and by way of *ex parte* summons in chambers applied for the custody of the two children of the marriage.

(2) The High Court in Kuala Lumpur heard the *ex parte* application on 18 August 2000 and granted custody and control of the two children of the marriage, Alexander Ishwara Dharmalingam ("Alexander") born on 13 November 1992 and Callum Amrish Dharmalingam ("Callum") born on 29 January 1996 to the petitioner husband together with an injunction restraining the respondent wife from taking the children out of the petitioner husband's custody and control and from the jurisdiction of the court. The respondent wife was allowed access to the children which will be varied yearly.

(3) On 15 April 2003 the respondent wife held the two children during the period of access given to her and ever since had denied the petitioner husband from meeting the children.

(4) On 14 October 2003 after a full trial the High Court again granted custody and control of the two children to the petitioner husband. An injunction against the respondent wife from taking the children away from the petitioner husband and outside the jurisdiction of the court was also endorsed and continuing ("the second order").

(5) On 8 December 2004 the respondent wife filed an application at the High Court to vary the second order, whereby she applied for custody of the two children and that she be allowed to bring the children to stay with her in Australia. The respondent wife had also exhibited an application for her brother and sister-in-law be appointed as the guardian to her children. On 13 June 2005 the High Court made the following orders:

(i) custody of the two children be given to the respondent wife.

(ii) no access to the two children be given to the petitioner husband until a child psychiatrist has certified that the children are ready and prepared to meet the petitioner husband.

(iii) the petitioner husband to return the passports of the children to the respondent wife; and that the respondent wife be allowed to bring the children to Australia for a maximum period of one month for every visit, pending the petitioner husband's application to refer the children to a child psychiatrist.

(iv) the petitioner husband to pay the respondent wife monthly maintenance equivalent to 20% of his gross income and the petitioner husband to pay for the education and the medical fees of the two children.

Orders Of The Court Of Appeal On 9 May 2006

[3] When the four appeal cases first came up for hearing on 9 May 2006, we had directed that a fresh psychiatric evaluation on the respondent wife by Dr. Chin Cheuk Ngen ("Dr. Chin") be submitted to this court. There were two current reports on the respondent wife by Professor Hussain bin Habil of Universiti Malaya Specialist Centre and Professor T. Maniam of Hospital UKM which reports unequivocally state that the respondent wife does not suffer from depression or any mental illness and is a fit mother. These two current reports were the basis for the learned judge of the High Court on 13 June 2005 to revert custody of the two children back to the respondent wife by way of the respondent wife's variation application at the court below which decision is the subject of the petitioner husband's appeal herein.

[4] The latest report of Dr. Chin confirms the findings of Professor Hussain bin Habil and Professor T. Maniam. It was Dr. Chin's first report in October 2000 which stated that the respondent wife was diagnosed as suffering from the mental illness of major depression that formed the basis of the High Court decision to grant custody of the children to the petitioner husband. Dr. Chin has now re-evaluated the respondent wife and has found that there is no evidence of symptoms of depression or anxiety and concludes, "In summary Madam Chantella's current mental state is normal. She is well." The respondent wife has been well for six years now as attested by Professor Hussain bin Habil and Professor T. Maniam.

[5] This court also on 9 May 2006 by way of a consent order, directed that the two children of the marriage be assessed or evaluated by an independent child psychiatrist and that the report be submitted to this court. The independent child psychiatrist, Dr. Rose Peng, has forwarded her exhaustive reports on the two children which stated that the children wanted to be with their mother. Dr. Rose Peng also finds that the children though very attached to their mother have suffered from the emotional harm that the custody proceedings have done to them. Dr. Rose Peng in her report recommends it is important for the children, as is their wish, to be with their mother to move on in life and concluded by stating as follows:

> As a professional independent assessor for these children, I have seen the pain in them and I hope that I have conveyed appropriately the sufferings these children had gone through in this report. I have real concerns of their future emotional wellbeing should this court case drags on any longer. They have to move away from all this threat to their basic sense of security, that is to be with their mother, they have to move on in their life as soon as possible; only then they can have any chance of healing. For the sake of these children, without any fear or favor to any of their parents, I appeal to all to please help stop this court case as soon as possible. Anyone's desire or further attempt to want to remove them from their mother, after knowing what price these children would have to pay, would be for no other reasons other than malice towards them.

Decision Of The Court On Appeal

[6] We would approach the four appeal cases before us by dealing with Appeal No. 2 and Appeal No. 3 together as these two appeals are inter related on the contested issue of custody of the two children of the marriage.

[7] It is to be noted at the outset that the petitioner husband and the respondent wife went through a protracted *inter partes* interim custody hearing in the High Court which lasted from September 2000 until the judgment of her ladyship Rahmah Hussain J (as she then was) on 14 October 2003 which gave custody of the two children to the petitioner husband. In arriving at her decision the learned trial judge had preferred the medical report of Dr. Chin, the psychiatrist, then recommended by the petitioner husband and his family to determine the fitness of the respondent wife as a mother to the two children. In all, five

psychiatrists including the two professors called by the respondent wife had given oral evidence. Dr. Chin had then diagnosed the respondent wife as suffering from major depression.

[8] In our view, with respect the High Court's decision of 14 October 2003 was inexplicable because the learned judge had preferred outdated reports of Dr. Chin whose last consultation was in August 2000 and not the then current reports of two eminent psychiatry professors of Professor Hussain b. Habil of Universiti Malaya Specialist Centre and Professor T. Maniam of Hospital UKM given just before they gave evidence in court which was in January 2003. And this was so despite the fact that the same learned judge had recorded in her notes of evidence that the relevant state was the respondent wife's current state and that Dr. Chin himself had said the best person to comment on the respondent wife's state of mind was her current doctors (Professor Hussain and Professor Maniam). The respondent wife appealed against the High Court decision of 14 October 2003 and her appeal was heard by the Court of Appeal on 12 October 2004. Unfortunately, the Court of Appeal then decided that there was no appealable error committed by the High Court and therefore declined to intervene but not without twice making very broad hints in the judgment that the respondent wife was not without remedy regarding her current mental status. (See the Court of Appeal grounds of judgment at pp. 722-729 of appeal record (vol. 2)).

New Developments Justifying Variation Order Be Given To The Respondent Wife

[9] During the trial at the High Court and before judgment on 14 October 2003, the two children rebelled and during access period given to the respondent wife one day in April 2003, they refused to return to the petitioner husband's house and since then have remained with the respondent wife. Both the High Court and the Court of Appeal have refused to order the respondent wife to deliver the children to the petitioner husband, the Court of Appeal twice ordering a stay of the High Court order dated 14 October 2003. By the time this state of position was brought before both the High Court and the Court of Appeal, there were already reports from the child psychiatrist Dr. Nor Hamidah in 2003 and 2004 which confirmed that the children were emotionally injured by the forced separation since August 2000. In fact, what was

most worrying was the fact that Alexander the elder boy wants to kill his father, the petitioner husband, and this had surfaced during the incident in May 2003 when the boys fought tooth and nail to resist the petitioner husband in their apartment when the petitioner husband tried to execute yet another *ex parte* order ordering the respondent wife to deliver the children to the petitioner husband. (See the respondent wife's affidavit dated 8 May 2003 at pp. 227-235 of appeal record (vol. 1)). None of the current reports of the two professors and of Dr. Nor Hamidah have been challenged credibly or on substantive grounds by any other specialist psychiatrist report that may be called or produced by the petitioner husband.

[10] We have also noted that the children have been interviewed by his lordship Faiza Tamby Chik J before he made his decision on 13 June 2005 to vary the order dated 14 October 2003. (See pp. 69-70 of appeal record (vol. 1)). The children obviously have expressed their wishes under s. 88(2)(b) of the Act. The learned judge did not find any brainwashing or parental alienation syndrome as alleged by the petitioner husband. On this point we find no reason to disturb such findings made by the learned High Court Judge.

[11] The respondent wife has further filed herein a recent affidavit dated 4 August 2006 annexing Dr. Chin's current report on her mental state which shows she is well and normal and able to take care of the children. The obtaining of this report was directed by the order of this court dated 9 May 2006 when this appeal was first heard and adjourned pending the said report. In our view with that report, there can be no more doubt on the respondent wife's fitness as a mother and be given the custody of the children.

[12] Learned counsel for the petitioner husband in their submission against the variation of the custody order of 14 October 2003, raised as a ground of appeal the doctrine of estoppel against the respondent wife from challenging or contradicting the said order of 14 October 2003 on the basis that the High Court then had accepted the diagnosis of Dr. Chin on the respondent wife's illness of major depression as the most accurate and reliable. It is our considered view that the principle of estoppel does not apply to children's cases especially in this case when there is a variation order reverting custody back to the

respondent wife on grounds that there has been material change in the circumstances since the *ex parte* order was granted in August 2000. It must also be noted that the law presumes that the child under seven years of age (Callum) should be under the custody care and control of his mother and the elder boy above seven (Alexander) which refused to be separated from the younger brother should also be given to the mother. (On the principle that the doctrine of estoppel does not apply to children's cases, see the case of *Re B (Children Act Proceedings) (Issue Estoppel)* [1997] 1 FLR 285).

[13] As regards the other grounds of appeal by the petitioner husband it is noted that the learned counsel wanted this court to revert back to the findings of the High Court in the original custody order dated 14 October 2003, ie, acceptance of Dr. Chin's diagnosis that the respondent wife was suffering from major depression and that Professor T. Maniam's reports prepared in October 2000 were flawed and unacceptable. We are of the view that for the purpose of the present appeal these are irrelevant since the appeal now is in respect of the variation order dated 13 June 2005 where there were material changes of circumstances. (See s. 96 of the Act). The respondent wife's present healthy state was confirmed by her current doctors (both the professors). The petitioner husband's ground that Professor T. Maniam's report in November 2004 is a continuation of his earlier reports is totally unjustified. Both the professors' reports prepared for the variation application were made after five years observation of the respondent wife since their first reports were prepared in October 2000. Both professors have given the respondent wife a clean bill of health. This is corroborated by Dr. Chin's latest report filed herein as ordered by the Court of Appeal on 9 May 2006. There have been material changes in the circumstances as evidenced by the reports of Professor T. Maniam and Professor Hussain in November 2004. We are of the view the learned High Court Judge in granting the variation order took full cognizance of the said reports and the wishes of the children who have shown increasing maturity.

[14] We have to state here that the court has a duty under the Child Act 2001 to protect the children who are obviously emotionally or physically injured. (See s. 17(1)(a)(b)(g)(h) and s. 17(2)(b) of the Act). Both the children (Alexander and Callum)

have shown signs of emotional injury as can be seen from the reports of Dr. Nor Hamidah (See pp. 505-515 of appeal record (vol. 2)).

[15] On the importance of taking into consideration the children's wishes and how a court should sensitively handle a situation when children rebel against a parent and refuse to see that parent, we would like to refer to the case of *Churchard v. Churchard* [1984] FLR 635 wherein the relevant facts of the case are as follows:

[16] The parties were married in 1965. There were two children of the marriage, both boys aged 10 and 8. The marriage broke down in 1977 when the father formed an association with another woman. When he told the mother he was leaving there was a violent altercation between the parties and the father received a number of stab wounds from the mother using a carving knife. The father left and, by agreement, the mother was granted custody of the boys and the father was granted defined access. In January 1978 the father made an application to the court complaining that access was not working properly and that the mother was not a suitable person to care for the children. A welfare report indicated that the mother was a caring and conscientious mother and that the problems over access were caused as a result of the strains and tensions at the handover for access; the father having great difficulty in controlling his feelings and sometimes failing to do so. The welfare officer made detailed recommendations as to access. Access was continued.

[17] The matter came before the court again in January and April 1979. Specific access was ordered, but it was not successful. In May 1979, when the father went to the house to collect the children they barricaded themselves in the loft and refused to come down. When the father subsequently attempted to see the children at the house they retreated to the loft and access had totally failed.

[18] The father applied to commit the mother to prison for disobeying the order as to access. He also applied for the custody of the children. The matter first came before the judge in July 1979. The judge adjourned the matter and requested a further welfare report. In October 1979 the matter was again adjourned and the mother was warned by the judge of the consequences of failing to comply with the order as to access. The children

continued to frustrate access by retreating to the loft when the father came to the house. In January 1980 the judge decided to 'debar' the father from access and he dismissed the father's application for custody.

[19] The father appealed. His lordship Ormrod LJ in delivering the judgment of the Court of Appeal in dismissing the appeal *inter alia* at p. 639 had this to say on access:

> So far as access is concerned, the time has come, the judge thought and I think rightly, to say 'enough is enough'. Enough attempts and struggles have been gone through in the last 18 months or so and the only way of dealing with the case is to accept the situation as it is for whatever reasons. It does not matter what the reason for their behaviour is. It cannot be in their interest that all this cumbersome machinery of the law should be put into operation in order to make boys of 10 and 8 do what they refused to do. It can only be slightly ridiculous.

[20] Likewise, in the present case we are of the view that the petitioner husband should accept the situation which has come about for whatever reasons. The reality has to be acknowledged in that the two children in this case cannot be compelled to see their father under the present circumstances. The petitioner husband must accept that. The ongoing fight over the custody and access of the two children between the petitioner husband and the respondent wife is a futile exercise and this should stop. In this case we think the learned judge was perfectly right in the decision he came on the question of access wherein with regard to one of the orders he had made on 13 June 2005 he had directed that no access to the two children be given to the petitioner husband until a child psychiatrist has certified that the children are ready and prepared to meet the petitioner husband. In our view it was certainly not the intention of the learned judge to have the petitioner husband as the father of the two children 'debarred' from access in the sense that he is unsuitable. The situation is that access simply cannot be made to work at the present time until the two children recover from the trauma of the past events that they have gone through.

[21] As regards the refusal of the trial judge on 13 June 2005 to grant the order as sought for by the respondent wife to allow her to take the children out of Malaysia to settle down in Australia, we will not deal with this issue in this appeal as there is no cross

appeal filed on this issue by the respondent wife. The respondent wife is only invoking the court's jurisdiction under s. 89 of the Act for us to consider making such an order. We do not wish to speculate the reason why the learned judge did not grant this particular order sought for by the respondent wife. We could only say that at that juncture when the learned judge made the order on 13 June 2005 there are still other ancillary matters involving the parties which have not been dealt with as yet such as the issue on maintenance of the two children. It is also worth mentioning that even up till now the petition for judicial separation between the two parties has not been heard and disposed of. At any rate we take the view that the respondent wife is at liberty to apply and could still file an application sometime later at the suitable time for the grant of the order to allow her to take the children out of Malaysia to settle down in Australia.

Conclusion

[22] For the reasons already given we would dismiss the petitioner husband's appeal in Appeal No. 2 and Appeal No. 3 with no order as to costs. All the orders of the learned judge of the High Court dated 13 June 2005 are hereby affirmed. With regard to Appeal No. 1 we would dispose of the appeal by making an order that the case be remitted back to the High Court for a full hearing of all the issues on the claims of maintenance. Appeal No. 4 has become academic in view of the fact that we have already heard and disposed of Appeal No. 2 and is hereby struck out. The deposits paid by petitioner husband and the respondent wife for all the four appeals before us are to be refunded to the respective parties.